IN THE COURT OF APPEALS OF IOWA

No. 0-134 / 09-1338
Filed April 21, 2010

TYSON FOODS, INC.,
Plaintiff-Appellant,

vs.

JAMIE DEGONZALEZ,
Defendant-Appellee.

Appeal from the Iowa District Court for Woodbury County, Duane E. Hoffmeyer, Judge.

The plaintiff appeals the district court's grant of summary judgment in favor of defendant. **AFFIRMED.**

Brian L. Yung of Klass Law Firm, L.L.P., Sioux City, for appellant.

Thomas M. Braddy and Patrick Ortman of Locher, Pavelka, Dostal, Braddy & Hammes, L.L.C., Omaha, Nebraska, for appellee.

Heard by Vaitheswaran, P.J., and Potterfield and Mansfield, JJ.

MANSFIELD, J.

After paying workers' compensation benefits to Maria DeGonzalez, Tyson Foods, Inc. brought a subrogation action against Maria's husband, Jaime Gonzales.[1] The district court found that Tyson's action was barred because Tyson had failed to comply with the requirement of Iowa Code section 85.22(2) (2007) that the employer give written notice to the injured employee to bring suit at least ninety days before commencing its own subrogation action. Tyson appeals. We agree with the district court that an e-mail from Tyson's attorney to Maria's attorney referring to subrogation rights did not constitute a sufficient notice to the injured employee to bring suit within the meaning of section 85.22(2). Therefore, we affirm the judgment below.

I. Background Facts and Proceedings.

This appeal is from a grant of summary judgment. The relevant facts are undisputed. On December 6, 2006, Maria was a passenger in a vehicle driven by Jaime, when it was involved in a single-vehicle accident. As a result of the accident, Maria sustained injuries for which her employer, Tyson, paid workers' compensation benefits.

On December 3, 2008, Tyson filed suit against Jaime seeking to maintain a subrogation interest pursuant to Iowa Code section 85.22(2) for the workers' compensation payments made to Maria. The following day, Tyson sent a letter to Maria informing her of the suit and her right to join the suit.

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[1] Defendant contends his proper name is Jaime Gonzales, not Jamie DeGonzalez as alleged by Tyson. We will use "Jaime" to refer to the defendant in this opinion. There is no question, in any event, that we are referring to Maria DeGonzalez's husband and driver on the date in question.

On July 13, 2009, Jaime filed a motion for summary judgment. Jaime argued that Tyson had failed to provide the required ninety-day written notice to Maria before filing its subrogation claim and therefore had no right of subrogation.

In response to Jaime's motion for summary judgment, Tyson produced an e-mail dated July 23, 2008. The e-mail was sent from Tyson's attorney to Maria's workers' compensation attorney, and stated:

> If the low back stuff is compensable then Tyson will have 85.22(2) subrogation rights. I am going to want to see the policy to ensure there is coverage for the accident. If there is a problem with timing of the new petition and an award then we are going to have greater issues since it could defeat our right of subrogation. Let me know your intentions so we can proceed accordingly.

The motion for summary judgment came before the district court for a hearing on August 17, 2009. The sole issue presented was whether the July 23, 2008 e-mail satisfied the notice requirement under Iowa Code section 85.22(2). On August 21, 2009, the district court found the e-mail to be deficient stating:

> The e-mail was sent in July of 2008 and appears to be nothing more than a disclosure that Tyson would exercise its subrogation rights under 85.22(2) and a desire to see a motor vehicle liability insurance policy to determine if there was coverage for the accident. The e-mail cannot be read as a demand for Maria to initiate suit.

Accordingly, Jaime's motion for summary judgment was granted. Tyson appeals.

II. Scope and Standard of Review.

We review a district court's ruling on a motion for summary judgment for the correction of errors at law. *See* Iowa R. App. P. 6.907; *Baker v. Shields*, 767 N.W.2d 404, 406 (Iowa 2009). When the only controversy concerns the legal consequences flowing from undisputed facts, summary judgment is the proper

remedy. *Bob Zimmerman Ford, Inc. v. Midwest Auto. I, L.L.C.*, 679 N.W.2d 606, 608 (Iowa 2004). We therefore examine the record before the district court in deciding whether the court correctly applied the law. *McNertney v. Kahler*, 710 N.W.2d 209, 210 (Iowa 2006).

III. Analysis.

The right of workers' compensation subrogation is "a creature of statute, and thus does not rely upon the general principles of subrogation." *Armour-Dial, Inc. v. Lodge & Shipley Co.*, 334 N.W.2d 142, 146 (Iowa 1983). Rather, the subrogation right derives from Iowa Code section 85.22(2), which states in pertinent part:

> In case the employee fails to bring such an action [against a third party] within ninety days . . . after written notice so to do given by the employer . . ., then the employer . . . shall be subrogated to the rights of the employee to maintain the action against such third party, and may recover damages for the injury to the same extent that the employee might. . . .

In its prior interpretation of this statute, the supreme court has imposed two prerequisites to the employer's acquiring subrogation rights: (1) a proper demand upon the employee to initiate the action and (2) a refusal or failure to take action within ninety days. *Armour-Dial, Inc.*, 334 N.W.2d at 146. "Without the employer's ninety day demand for the employee to commence suit there is no subrogation of the rights of the employee to maintain an action." *Id*.

Tyson asserts that given the attorney-to-attorney context, and the direct reference to section 85.22(2), the July 23, 2008 e-mail should be construed as a proper notice and/or demand. We disagree.

Section 85.22(2) requires a "written notice" to the employee "to bring an action." In *Armour-Dial* this was described as a "demand . . . to initiate the action." 334 N.W.2d at 146. Like the district court, we do not believe the July 23, 2008 e-mail can be fairly characterized as a demand to bring suit. There is no reference at all to Maria's bringing a lawsuit. Instead, the e-mail simply mentions the potential that Tyson would exercise subrogation rights. We see an unbridgeable gap between a reference to Tyson's potential exercise of subrogation rights and a notice that actually does what is necessary to establish those rights.

Tyson argues that lawyers were involved in the July 23, 2008 communication, and that it is sufficient that "the employee's attorney was made aware of the employer's intention to maintain its right of subrogation more than 90 days prior to the date [the subrogation action] was filed." We find this argument unpersuasive. While "substantial compliance" with the notice/demand requirement may well be sufficient, and might for example justify giving notice to the attorney rather than the party (as was done here), *see Robinson v. State*, 687 N.W.2d 591, 595 (Iowa 2004) (finding that notice to the attorney of record substantially complied with the terms of a statute requiring notice to the claimant), we cannot find that Tyson substantially complied with the statute as a whole. As noted, the e-mail did not mention Maria's bringing an action at all. *See Iowa State Bank & Trust Co. v. Michel*, 683 N.W.2d 95, 105 (Iowa 2004) (holding a clause that failed to mention the homestead exemption did not substantially comply with Iowa Code section 561.22). While Maria's attorney may have subjectively understood Tyson's intentions, a reader's understanding

does not by itself transform a writer's noncompliance with a statute into substantial compliance. *See id.* (holding further that "defendants' subjective understanding of the transaction" did not excuse the bank's noncompliance). We believe that at least some type of reference to the claimant's bringing her own action was required to achieve substantial compliance. The inclusion of such a reference, in our view, is an "essential" part of Iowa Code section 85.22(2). *See Robinson*, 687 N.W.2d at 595 (reiterating that substantial compliance means "compliance in respect to *essential matters* necessary to assure the reasonable objectives of the statute" (emphasis added).

Tyson also argues that section 85.22(2) was not enacted "for the benefit of the third party tortfeasor." *See Armour-Dial, Inc*., 334 N.W.2d at 146. However, judicial observations about legislative purpose must take a second chair to actual legislative language. *Ranniger v. Iowa Dep't of Revenue & Fin.*, 746 N.W.2d 267, 270 (Iowa 2008) ("[I]n searching for legislative intent, we are bound by what the legislature said, not by what it should or might have said."). The law here unambiguously requires a written notice to the injured employee to bring an action. No such notice was provided. In fact, Tyson is reading the dictum in *Armour-Dial* out of context. In that case, after acknowledging that section 85.22(2) was not enacted for the benefit of the third party tortfeasor, the supreme court went on to state that compliance with the "specific statutory scheme" in that section was nonetheless required. *Armour-Dial, Inc.*, 334 N.W.2d at 146; *see also Liberty Mut. Ins. Co. v. Winter*, 385 N.W.2d 529, 531-32 (Iowa 1986) ("The statute describes with particularity the reimbursement rights it creates, and it explicitly identifies circumstances which may cause loss of certain of those

rights."). When an employer seeks the benefits of being subrogated to the rights of the employee under the statute, the employer must also comply with the associated burdens and conditions. *See* 101 C.J.S. *Workers' Compensation* § 1674, at 544 (2000); *see also Liberty Mut. Ins. Co.*, 385 N.W.2d at 532 (stating "the right of subrogation against third parties is dependent upon compliance with the . . . notice requirement of subsection 85.22(2)"). Accordingly, "[w]ithout the employer's ninety day demand for the employee to commence suit there is no subrogation of the rights of the employee to maintain an action." *Armour-Dial, Inc.*, 334 N.W.2d at 146.

Additionally, we disagree with Tyson's implicit assumption that all the goals of section 85.22(2) are fulfilled if an employee is notified that a subrogation action may be filed in the future if the employee's compensation claim is accepted. Like many laws, section 85.22(2) actually balances several different legislative aims. As we read section 85.22(2), *one* of its purposes is to allow the employer to recover from a third party tortfeasor the benefits it has paid from a third party tortfeasor. However, the statute also serves additional purposes. It protects the employee's primary right to pursue a third party tortfeasor for damages in excess of workers' compensation benefits; it avoids overlapping litigation over the same incident; and it eliminates messy questions of standing and real party in interest. To achieve these multiple purposes, the statute requires a written notice from the employer to the employee before the employer sues the third party tortfeasor—a notice that was not given here.

Lastly, we note Tyson's argument that application of section 85.22(2) may be unfair in some contexts. For example, Tyson argues there could be a

circumstance where the statute of limitations is about to run as against a third party tortfeasor but it is uncertain whether the employee is even seeking workers' compensation benefits for the injury. However, Tyson does not maintain that it would have been impractical or unrealistic to provide a notice here under section 85.22(2) more than ninety days before the running of the statute of limitations against Jaime. Indeed, it contends that it *did* give such a notice.

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.